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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92057246
Party	Defendant SA International Inc.
Correspondence Address	SA INTERNATIONAL INC. SUITE 120, 1490 NORTH 2200 WEST SALT LAKE CITY, UT 84116 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Philip Furgang
Filer's e-mail	philip@furgang.com
Signature	/Philip Furgang/
Date	07/22/2013
Attachments	MOTION TO DISMISS.pdf(120634 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

FLEXINTERNATIONAL, INC.,)	Cancellation No. 92,057,246
)	
Petitioner)	Registration No. 3,681,593
)	
-against-)	Date Issued September 8, 2009
)	
SA INTERNATIONAL INC.)	
)	
Registrant.)	

**MOTION FOR SUMMARY JUDGMENT
BY REGISTRANT SA INTERNATIONAL INC.**

I. The Parties and Nature Of This Action

A. The Parties:

Petitioner Flexinternational, Inc., is a corporation organized under the laws of the State of Delaware with offices at 856 Third Avenue S., Naples, FL 34102.

Registrant SA International Inc. is a corporation organized under the law of the State of Pennsylvania with offices at 5296 Commerce Drive, Suite 102, Murray, UT 84107.

B. Nature of This Action:

Petitioner petitions to cancel Registrant's Reg. No. 3,681,593 for FLEXI as used to identify "computer software for sign making and digital printing."

Petitioner bases its action on its Registration No. 2,243,922 for FLEXI as used to identify unrelated software, namely "computer programs for use in accounting."

II. The Motion

Registrant moves, pursuant to Fed. R. Civ. Pro. §12(b)(6), to dismiss Petitioner's pleading for failure to state a cause of action upon which relief may be granted.

III. The Facts

For purposes of this motion, all facts are those of record as set forth by Petitioner in its Notice of Cancellation to the degree that such allegations are understood.

Registrant's mark is registered for "computer software for sign making and digital printing." Petitioner alleges not a single fact to support its belief that such goods would be confused with totally different goods identified by its FLEXI mark, namely, Petitioner's identical mark is registered for "computer programs for use in accounting."

Petitioner admits that Registrant uses a family of FLEXI marks, namely FLEXISIGN-PRO, FLEXIEXPERT, FLEXIPRINT & CUT, FLEXISIGN, FLEXILETTER, and FLEXIDESIGNER.

In support of its position, Petitioner alleges only that it has registered FLEXIDESIGNER and that Registrant is using FLEXIDESIGNER. In support of its position, position represents that its FLEXIDESIGNER mark is federally registered, Registration No. 2,097,336. However, this registration, Registration No. 2,097,336 is not Petitioner's registration. Rather, Registration No. 2,097,336 is Registrant's incontestable registration for FLEXIDESIGNER for "computer software for designing signs and graphics."

The only other allegations by Petitioner are that: it "believes" that Registrant's sale of goods identified by trademark FLEXI is an infringement; it "believes" that Registrant's use of FLEXI on websites and on Facebook causes confusion in the marketplace; that it "believes" that it has (an unidentified) registration for FLEXIDESIGNER which is infringed by Registrant's

incontestable registration FLEXIDESIGNER. However, the mark cited in this proceeding for this proceeding is FLEXI, not FLEXIDESIGNER.

IV Argument

Point I: Standard for Summary Judgment

Except as otherwise provided, and wherever applicable and appropriate, procedure and practice in inter-partes proceedings before the Trademark Trial and Appeal Board shall be governed by the Federal Rules of Civil Procedure. 37 C.F.R. § 2.116(a)

Pursuant to the Fed. R. Civ. Proc. §12(b)(6), a defense of failure to state a claim upon which relief can be granted may be asserted as a motion to dismiss. In this matter, Petitioner has failed to state a claim upon which relief may be granted.

The Supreme Court, in *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) held:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Id.*, at 570, 127 S.Ct. 1955. A claim has facial plausibility when the *plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.* *Id.*, at 556, 127 S.Ct. 1955. *The plausibility standard* is not akin to a “probability requirement,” but it *asks for more than a sheer possibility that a defendant has acted unlawfully.* *Ibid.* Where a complaint pleads facts that are “merely consistent with” a defendant's liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’ ” *Id.*, at 557, 127 S.Ct. 1955 (brackets omitted) (emphasis added).

In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 1959, 167 L. Ed. 2d 929 (2007), the Supreme Court further held:

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests,” *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*, a plaintiff's obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and *a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.* (emphasis added)

Additionally, pursuant to 37 C.F.R. § 2.112 (a), the petition for cancellation must set forth a short and plain statement showing why the petitioner believes he, she, or it is or will be damaged by the registration, state the ground for cancellation, and indicate, to the best of petitioner's knowledge, the name and address of the current owner of the registration.

Point II. Petitioner Fails to Plead Facts Upon Which Relief may be Granted

Petitioner's entire three sentence pleading states:

We believe the Registered Trademark 3681593 is an infringement due to the fact that both companies produce software and software packages - SA International produces FlexiSign-Pro, FlexiExpert, FlexiPrint & Cut, FlexiSign, FlexiLetter, and FlexiDesigner. We actually have trademarked FlexiDesigner, Trademark 2097336. We believe this causes confusion in the marketplace as they are using Flexi™ on various websites and Facebook.

Petitioner has utterly failed to meet the requirements of *Iqbal* and *Twombly*, *supra*, and 37 C.F.R. § 2.112 (a):

Petitioner is required to set forth facts that are more than “merely consistent with” a defendant's liability, *Iqbal*, *supra*, and are enough to raise a right to relief above the speculative level. *Twombly*, *supra*.

To summarize, the only facts stated by Petitioner are that: (1) both parties produce software; (2) Petitioner believes that Registrants sale of product under the trademark FLEXI is an infringement of its FLEXIDESIGNER registration; (3) Registrant uses FLEXISIGN-PRO, FLEXIEXPERT, FLEXIPRINT & CUT, FLEXISIGN, FLEXILETTER, and FLEXIDESIGNER marks to identify its software; (4) Petitioner believes that Registrants' use of FLEXI on websites and on Facebook cases confusion in the marketplace; and (5) Petitioner has a registration for FLEXIDESIGNER (although, as indicated, the registration number identified in its pleading is that of *Registrant's* registration of *its* FLEXIDESIGNER mark which is incontestible.)

While Petitioner sets forth a "belief" that there will be confusion and that Registrant's use is an infringement, Petitioner has set forth not one fact to support its "belief".

Petitioner sets forth the grounds for cancellation as "confusion" between its FLEXIDESIGNER mark and Registrant's FLEXI mark. A valid ground for cancellation under section 2(d) of the Lanham Act, which precludes registration when a mark is likely to cause confusion with a mark or trade name previously used or registered by another. 15 U.S.C. § 1052(d) (2000); *Cunningham v. Apfel*, 222 F.3d 406, 946 (8th Cir. 2000). Hence, a party petitioning for cancellation under section 2(d) must show that it had priority and that the registered mark creates a likelihood of confusion. *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1161-62 (Fed. Cir. 2002)

Petitioner's allegation of confusion is nebulous and unsupported by any facts. Petitioner does not "show...that [Petitioner's] registration of the mark creates a likelihood of confusion." Petitioner bald allegation of confusion, is only a nebulous "belief."

Petitioner alleges are facially absurd when it is observed that Registrant's mark identifies "software for sign making and digital printing." Petitioner's mark identifies *software for use in accounting and financial applications.* How marks used to identify unrelated goods is not understood.

Petitioner fails to assert any fact which would support a "plausible" finding of likelihood of confusion by consumers of accounting and financial application software and when it admits that Registrant owns an incontestable registration for an entirely different FLEXIDESIGNER, which is not the subject of this action and further admits that Registrant owns a family of FLEXI marks.

As required for a pleading in a cancellation proceeding, Petitioner has failed to allege that it has priority of use of its mark, nor has it offered any facts which "show that it had priority" of use. Its only factual allegation is its citation of FLEXIDESIGNER. Even this is without merit. It cites in support of its rights not its registration but Registrant's incontestable registration as its own. Further, FLEXIDESIGNER is not the subject of this Cancellation Proceeding nor could it be because Registrant's registration is incontestable. Further, Registrant's registration sets forth a date of first use three years *after* Petitioner's date of first use in the registration it asserts here as its basis for cancellation: 1996!

V. Conclusion

Petitioner alleges no facts. Petitioner's sole basis for its proceeding is its "belief" which is nebulous and, at best, facially erroneous. The pleading is erroneous, absurd and frivolous.

For all of these reasons, Registrant moves to dismiss the Petition for Cancellation as it does not state a cause of action upon which relief may be granted.

Respectfully submitted,
FURGANG & ADWAR, L.L.P.
Attorneys for Registrant
By /Philip Furgang/
PHILIP FURGANG
Reg. No. 245,246
1325 Avenue of the Americas
28th Floor
New York, NY 10019
212-725-1818
philip@furgang.com

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